INDEX

Subject Index

Jurisdictional statement 1
Statutory provisions sustaining jurisdiction 1
Legislation drawn in question 2
How legislation construed by State Court 2
Michigan Supreme Court is Court of last resort 3
Rendition of decision 3
Opinion 3
Statement of nature of case, rulings of Courts and manner in which federal questions were raised 3
Grounds and decisions sustaining appellate jurisdiction of the Supreme Court of the United States and showing federal questions involved on appeal 7
Appendix "A"—Opinion of the Michigan Supreme Court 13

Table of Cases Cited

Atkinson Railroad Co. v. *Matthews*, 174 U.S. 104 8
Barbier v. *Connolly*, 113 U.S. 27, 28 L. ed. 923, 5 S. Ct. 357 8
Butchers Union Co. v. *Carson City*, 111 U.S. 746 12
Com. v. *Campbell*, 133 Ky. 50 10
Cotting v. *Kansas City Stockyards Co.*, 183 U.S. 79, 46 L. ed. 92, 22 S. Ct. 30 7
Cowan v. *City of Buffalo*, 288 N.Y.S. 239 12
Eight O'Clock Club v. *Buder*, 332 Mich. 412, — N.W. (2d) — 4
Gulf v. *Ellis*, 165 U.S. 154 8
Halter v. *Nebraska*, 205 U.S. 34 8
Hartford Steam Boiler Inspection & Insurance Co. v. *Harrison*, 301 U.S. 459, 81 L. ed. 1223, 57 S. Ct. 838 8
Kelso, Ex parte, 82 Pac. 241 12

Page

Louis K. Liggett Co. v. *Baldridge*, 278 U.S. 105, 73 L. ed. 204, 49 S.Ct. 57 8
State v. *Gilman*, 33 W. Va. 146, 10 S.E. Rep. 283 11

STATUTES CITED

Constitution of Michigan, Article 2, Section 1 6
Constitution of the United States, 14th Amendment .. 6
Judicial Code, Section 238 (Act of Congress of February 13, 1925, c. 229, 43 Stat. 936) 3
Michigan Liquor Control Act P.A. 1933 (Extra Session) No. 8 (Stat. Ann. Para. 18.97, et seq. 8
Michigan Statutes Annotated, 18.321, Mich. Compiled Laws 1948, 427.1 ..... 7, 10
Public Acts of Michigan, 1949, No. 295 (Stat. Ann. 1949 Cum. Supp. par. 18.997(3)) 2
United States Code, Title 28, Section 1257 (Act of June 25, 1948, C. 646, 62 Stat. 929) 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 788

THE EIGHT O'CLOCK CLUB, A CORPORATION, KILOWATT LAKE BOAT CLUB, A CORPORATION, AND ROY WOOD, *Appellants,*

vs.

OTTO K. BUDER AND MICHIGAN LIQUOR CONTROL COMMISSION

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

In compliance with Rule 12 (1) of the Supreme Court of the United States, as amended April 6, 1942, appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 1257 of 28 U.S.C.A., Act of Con-

gress June 25, 1948. C. 646, 62 Stat. 929. The Michigan Supreme Court is the highest court of the State of Michigan and there was drawn in question in this litigation the validity of a statute of said State on the grounds of its being repugnant to the Constitution of the United States and the decision of the Michigan Supreme Court was in favor of its validity. This case presents a state of facts within the jurisdiction of this Court.

Legislation Drawn in Question

The legislation, the constitutionality and validity of which is here drawn in question is an act of the Michigan Legislature passed in 1949 being an amendment to the Michigan Liquor Control Act. It is Section 26 added by Public Acts 1949, No. 295 (Stat. Ann. 1949 Cum. Supp. par. 18.997 (3)). This legislation became effective in September 1949 and reads as follows:

> "No person shall maintain, operate, lease or otherwise furnish to other persons any premises or place which is not licensed under this act, wherein such other persons may engage in the drinking of alcoholic beverages, for a fee or for any other consideration, including the sale of food, mixers, ice or other fluids used with alcoholic drinks or the storage of alcoholic liquors: Provided, That the provisions of this section shall not apply to any hotel nor to any licensee under the provisions of this act: Provided, further, That the provisions of this section shall not be construed to repeal or amend the provisions of section 26b of this act."

How Legislation Construed by State Court

The Michigan Supreme Court held the statute constitutional under the police powers of the State and specifically held that it did not violate the 14th Amendment of the United States Constitution; That it exempted hotels from the provisions of the act as a class and that such was rea-

sonable and that the Michigan legislature could make such discrimination for practical purposes; That it did not take property of the plaintiffs without due process of law; That it was not a denial of due process of law by prohibiting appellants to furnish a place where members of its club could be served intoxicating beverages belonging to such member and a charge made for food in connection therewith, and a charge for mixers and services in connection with the drinking by members of their own intoxicants. The Michigan Supreme Court refused to hold the statute arbitrary and unreasonable under the State's police powers and contrary to the 14th Amendment of the United States Constitution.

Michigan Supreme Court Is Court of Last Resort

The statute involved was upheld as constitutional and valid under the United States Constitution by the Circuit Court for the County of Kalamazoo which decree was affirmed by the Supreme Court of Michigan. The Supreme Court of the State of Michigan is, by the constitution and statutes of the State, the highest court of appeals in that State and the court of last resort in which a decision could be had in his case.

Rendition of Decision

The opinion and decision of the Michigan Supreme Court was filed March 6, 1952. Under Michigan Supreme Court rules an order in harmony with such a decision automatically follows the rendering and filing of such a decision. Under Michigan court rules the time for filing a petition for re-hearing has expired on date hereof. The decision and order of the Michigan Supreme Court in this case are final and this application is duly presented within three months as required by law, Section 238 of the Judicial Code, Act of Congress of February 13, 1925, chapter 229, 43 Stat. 936.

Opinion

The opinion of the Michigan Supreme Court, the court of last resort in said State, is reported in 332 Michigan Supreme Court Reports, 412, ——— N.W. (2nd) ———. The opinion of the Michigan Supreme Court is appended hereto and designated as "Appendix A." For the sake of brevity the Circuit Court opinion is not referred to or copied herein for the reason that said Circuit Court did not construe the exemption of hotels as meaning all hotels but classified the same as hotels holding liquor licenses granted by the Michigan Liquor Control Commission. All other parts of said Circuit Court opinion refer to non-Federal questions and the basis of said opinion went to the questions raised other than Federal grounds. The Michigan Supreme Court held that the exemption applied to all hotels whether licensed to sell liquor by the Michigan Liquor Commission or not.

Statement of Nature of Case, Rulings of Court and Manner in Which Federal Questions Were Raised

(Figures in parentheses refer to pages of record unless otherwise clearly indicated).

This case was submitted to the trial court on an agreed statement of facts (52-53). The Kilowatt Lake Boat Club, a Michigan corporation, filed a petition to be made a party plaintiff after commencement of the suit and was permitted by order of the court (IV) to become a party plaintiff. This plaintiff has appealed with the other appellants. (1) After the settled record had been filed the Beacon Club, appellant, withdrew its appeal.

The substance of the stipulation as to facts and the pertinent admitted portions of the Bill of Complaint are as follows:

"The plaintiff clubs are Michigan non-profit, non-stock membership corporations, having registered offices in Kala-

mazoo County, which maintain, operate and furnish club rooms (not licensed under the Michigan Liquor Control Act), wherein members of said clubs may engage in drinking alcoholic beverages (property of and brought in by the several members), and the said club corporations furnish mixers, ice, and other fluids used with alcoholic drinks, and serve meals, all for a fee and for other considerations, and also provide for dancing, radio, and other social entertainment for its members, and said corporations are private, and not places of public resort. None of said corporations can continue to exist financially if the aforesaid method of doing business should become illegal and consequent discontinuance thereof required, and each corporation has substantial financial and property interests, and the affairs of said clubs are conducted by boards of directors elected by the members. Members of each of said corporations have advised the corporation officers that they do not and will not continue membership unless they are permitted to mix and drink alcoholic beverages on the club premises. There is no stipulation that these clubs are, as a question of fact or matter of law, bona fide clubs within the definition of Section 2 of the Liquor Control Act, such being immaterial to the issues of this cause. The plaintiffs, Carl Ehrman, Loyal T. Ferris and Roy Wood, are the several owners of the several realties upon which the premises of the said corporate clubs are situated, and as such owners and also as members and officers of said corporate clubs these individuals have a direct interest in the outcome of this suit, and each are citizens, residents, electors, and taxpayers of this county and state. It is conceded that the foregoing are proper parties plaintiff. Defendant Otto K. Buder is the Sheriff of Kalamazoo County, who is required to enforce the Liquor Control Act and Section 26c involved herein as provided in Act No. 8 of the Public Acts of 1933, Extra Session, as amended. The

Michigan Liquor Control Commission is a statutory agency of the State of Michigan, whose duty is also to enforce the provisions of said Act. It is conceded that these are proper parties defendant."

The Federal questions were raised in the pleadings of the appellants in their Bill of Complaint as follows:

"Said Act is in conflict with and contrary to Article 2, Section 1 of the State Constitution, and Article 14, Section 1 of the U. S. Constitution, in that the proviso therein exempting hotels is not a substantial or real classification, and the same has no reasonable relation to the object of the subject matter, and is arbitrary and discriminatory and will create a monopoly in hotels to do the acts prohibited in said Section 26c, and bars the same acts as to all others including these plaintiffs regardless of the place in which such prohibitive acts may be done. Said Act is repugnant to and in conflict with the 14th Amendment of the United States Constitution, and Article 2, Section 16 of the State Constitution, in that it deprives the plaintiffs herein of their property by prohibiting harmless club activities and a venture which does not involve the sale of alcoholic liquors, but consists simply of permitting the consumption of the members' own liquor on the premises of their club."

On their appeal to the Michigan Supreme Court the appellants urged the same grounds of the Federal questions involved in their statement of reasons and grounds of appeal and assignment of error. (3-4). The Circuit Court as indicated above, construed the term hotels to mean hotels licensed by the Michigan Liquor Control Commission and that as a class was not violative of the United States Constitution 14th Amendment to make such a classification embracing all liquor licensees. The Circuit Court did not pass upon the further constitutional ground urged under

the Federal Constitution and the opinion remains silent in that respect. However, the Circuit Court's decree upholding the validity of the Act in and of itself is a denial that the Act violates the Constitution in the latter respect. The Michigan Supreme Court as indicated and as appears in its opinion, held that the exemption proviso applies to all hotels regardless of whether they are licensees of the Michigan Liquor Control Commission or not.

The only definition of a hotel appearing in the Michigan statutes is that it includes every building or structure used or maintained as or held out to the public to be an inn, hotel or lodging house. Mich. Stat. Ann. 18.321, Mich. Compiled Laws 1948, 427.1. This definition is more or less the same as the dictionary definition and as commonly used by laymen.

Grounds and Decisions Sustaining Appellate Jurisdiction of the Supreme Court of the United States and Showing Federal Questions Involved on Appeal.

(Part 1)

The statute as construed by the Michigan Supreme Court absolutely prohibits the appellants from permitting the members of its clubs to have their own intoxicants on the premises of the clubs and drink the same when a charge is made for the mixers and other non-alcoholic ingredients, because the appellants are not hotels.

The classification based solely upon the fact that the appellants are not hotels, bears no reasonable relation to the purpose for which the statute was enacted and therefore the classification is unreasonable, arbitrary and void and in conflict with the 14th Amendment of the United States Constitution.

Cotting v. *Kansas City Stockyards Co.*, 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30.

Barbier v. *Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 5 S. Ct. 357.

Louis K. Liggett Co. v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57.

Hartford Steam Boiler Inspection & Insurance Co. v. *Harrison*, 301 U. S. 459, 81 L. Ed. 1223, 57 S. Ct. 838.

The classification must always be based upon some difference which bears a reasonable relation to the Act in respect to which the classification is proposed and can never be arbitrary or without basis. *Gulf* v. *Ellis*, 165 U. S. 154. *Halter* v. *Nebraska*, 205 U. S. 34. *Atkinson Railroad Co.* v. *Matthews*, 174 U. S. 104.

In the case of *Hart* v. *Township of Teaneck*, 50 Atlantic 2nd 856, a municipal ordinance which permitted all restaurants other than those conducting business in lunch wagons could remain open during certain hours of the night, was held unconstitutional because it discriminated without any reasonable basis and therefore violated the 14th Amendment of the United States Constitution.

By permitting hotels to operate and maintain places for persons to engage in the prohibited acts as to others and without license, the legislature has tacitly and directly condoned such ventures to be no more offensive than any other ordinary or social venture. There is no conceivable basis as to why hotels are in a different category than others. The Act does not refer to any particular part of the hotel and neither does it restrict the occupants and patrons of such a venture conducted in a hotel, to those who might be the hotel guests. The serving of a bottle of mix manufactured by the same bottling company is no more offensive or unhealthy or against public morals whether served in a place provided for such in a hotel or in a private club as maintained by these appellants. We cannot conceive by what process of reasoning the conclusion is reached by the Michigan Supreme Court that restaurants and dis-

pensers of beverages not located in hotels should be prohibited entirely from operating as provided in this statute and yet hotels may maintain such restaurants and dispensers of beverages in a part of the hotel building. The alcoholic drinks are not more dangerous to the health when consumed in a building other than a hotel than when sold in a place in a hotel. From the standpoint of health there is no difference whatever. The Michigan Supreme Court has said that for practical purposes, places in hotels could be exempted. We can conceive of no set of circumstances whereby this conclusion was reached.

Of particular importance is the fact that any hotel may indulge in the activities prohibited by others without benefit of a license from the Michigan Liquor Control Commission. Permitting one group, viz. hotels, to engage in such practice without restriction, is an admission by the legislative body that no control over the same is necessary and an acknowledgment that such operations contained no inherent danger. All hotels are placed in one category irrespective of the number of guest rooms, the size and number of floors, and the location within the hotel of the place of operating the venture wherein such practices may be carried out. Such classification, being so broad and general in nature within the physical properties of hotels only, has no reasonable basis and violates the equal protection provision of the 14th Amendment as interpreted and contained in the decisions of this Court appearing above and many others. The whole intent and purpose of the section is to create a monopoly in a classification of any hotels.

Part 2

Although appellants urged in the pleadings and briefs that the Act took appellants' property without due process of law in that it deprived them of their property by prohibiting harmless club activities, the Michigan Supreme

Court opinion dismissed the contention without comment except as contained in the next to concluding paragraph of the opinion. In that paragraph reference was made to the discussion contained in the preceding paragraph relative to the exemption of hotels. The stipulated facts indicate that the enforcement of the Act would require the discontinuance of appellants' club activities (53).

Under the Michigan Liquor Control Act P.A. 1933 (Extra Session) No. 8 (Stat. Ann. Para. 18.97 et sec) packaged liquor is sold to the public through State retail stores and specially designated licensed private agencies. If the purchase of liquor from the State is legal, its consumption in a reasonable manner becomes a legal right and the operation of an establishment such as appellants' wherein this right might be enjoyed is in itself a property right, so long as such operation does not unduly interfere with the health, safety, morals or welfare of society. The legislature apparently recognized this right by permitting such activities unrestricted so long as it was a hotel carrying on the operations.

In the case of *ex-parte Wilson*, 119 Pac. 596, the State court held unconstitutional an act making it illegal for any person to have liquor in any place of amusement or recreation or public resort or private club, whether such liquors were intended for one's own use or not, with the following pertinent comment on same:

> "Our research has not disclosed a single case in conflict with the doctrine of authorities quoted and none has been called to our attention; and the only conclusion that we can legitimately arrive at is that the action in question is not within a reasonable exercise of the police power of the state . . . it is unconstitutional and void."

According to *Com.* v. *Campbell*, 133 Ky. 50, the mere posession of intoxicating liquors kept for one's own use is

not inherently injurious to the health, morals or safety of the public and, therefore, legislation prohibiting such keeping in possession is not a legitimate exercise of the police power and acts as an injury and abridgment of the privileges and immunities of the citizens. It has been generally held that the police power does not extend to the deprivation of a citizen the right to have intoxicating liquor in his possession for his own use. While selling and giving away of intoxicating liquor may be regulated when such power exists, intoxicating liquor is not contraband and is recognized as property. The appellants herein simply act as an agent in keeping the possession of the liquor by direction of the members of the club. So long as it is lawful to own and consume liquor, as it is in the State of Michigan, and so long as it is done in such a manner that the rights of others are not interfered with, it should make no difference whether the person receives or keeps or drinks or uses such liquor in his home, in his office or at his private club such as maintained by these appellants. This Act makes it unlawful to keep or use, under certain circumstances, what the State law recognizes as property in which the public and others, not members of the appellants' club, are in no way affected or interested. A fortiori what the members of the appellants' club can lawfully do, then the appellants can do for them at their direction. The court in *State* v. *Gilman*, 33 W. Va. 146, 10 S. E. Rep. 283, page 284 says:

> "The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void."

The appellants do not sell intoxicating liquors. The furnishing of food and non-alcoholic ingredients for consuming liquor to club members who own liquor purchased lawfully by them, is not a harmful and injurious venture.

Legislation may not prohibit engaging in a lawful venture, *Butchers Union Co.* v. *Carson City*, 111 U. S. 746.

The State has no right to interfere arbitrarily with private business or to impose any unreasonable and unnecessary restrictions thereon under the guise of promoting public welfare. *Cowan* v. *City of Buffalo*, 288 N. Y. S. 239.

To prohibit instead of regulate a lawful business is a taking of property without due process of law. *Ex Parte Kelso*, 82 Pac. 241 (Cal.) (Act prohibited any stone quarry within city limits).

Wherefore the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with rules of the Court because the Court below disposed of important and substantial Federal questions in a way that is in conflict with applicable decisions of this Court and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for this Court's power of supervision and review to halt the same.

Respectfully submitted,

The Eight O'Clock Club,
Kilowatt Lake Boat Club,
and Roy Wood,
By John C. Howard,
James B. Stanley,
Their Attorneys.
Business Address:
610 Kalamazoo Bldg.,
Kalamazoo, Michigan.

Dated: April 7, 1952.

APPENDIX "A"

STATE OF MICHIGAN, SUPREME COURT

THE BEACON CLUB, a Corporation; THE EIGHT O'CLOCK CLUB, a Corporation; KILOWATT LAKE BOAT CLUB, a Corporation, and LOYAL T. FERRIS and ROY WOOD, *Plaintiffs and Appellants,*

v.

OTTO K. BUDER and MICHIGAN LIQUOR CONTROL COMMISSION, *Defendants and Appellees*

BEFORE THE ENTIRE BENCH

CARR, *J.:*

The question at issue in this case is the constitutionality of § 26c of the Michigan liquor control act,* which section was added by PA 1949, No. 295 (Stat. Ann. 1949 Cum. Supp. § 18.997(3)). As first introduced, the legislative measure (House Bill 405) provided for the amendment of certain designated sections, none of which requires discussion in the present controversy. When the bill reached the Senate it was amended by adding the section indicated, which reads as follows:

> "No person shall maintain, operate, lease or otherwise furnish to other persons any premises or place which is not licensed under this act, wherein such other persons may engage in the drinking of alcoholic beverages, for a fee or for any other consideration, including the sale of food, mixers, ice or other fluids used with alcoholic drinks or the storage of alcoholic liquors: Provided, That the provisions of this section shall not apply to any hotel nor to any licensee under the provisions of this act: Provided, further, That the provisions of this section shall not be construed to repeal or amend the provisions of section 26b of this act."

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* PA 1933 (Ex Sess), No. 8, as amended (CL 1948, 436.1, et seq., as amended (Stat. Ann. & Stat. Ann. 1949 Cum. Supp. 18.971 et seq.))

The title of the bill was changed to include reference to the added section, the House of Representatives concurred in the action, and the bill was ordered enrolled for presentation to the Governor for his approval or disapproval. Due to an oversight the title was not correctly printed, reference to the added section being omitted. Within the time limited by article 5, § 36, of the State Constitution, the Governor returned the measure to the House of Representatives with a message indicating that he had not signed it because of doubts as to the constitutionality of the added section. Thereupon the clerk of the House examined the legislative records and discovered the error that had been made in the printing of the enrolled act. As a result the measure was printed in accordance with the legislative action and was returned to the Governor, who signed it and transmitted it to the Secretary of State. Such final action was presumably taken on the assumption that the submission of an incorrect copy of the measure passed by the Legislature was a mere nullity.

The purpose of section 26c is not questioned. It is directed at the operations of so-called "bottle clubs", and, while not a direct inhibition on the consumption of alcoholic liquor, is designed to restrict the furnishing of premises for hire whereon such beverages are stored or consumed. In accordance with such purpose, the sale of food and of fluids designed to be used with alcoholic drinks on such premises was included in the inhibition.

The corporate plaintiffs are duly organized under the laws of this State and have offices in Kalamazoo county. It is conceded that they maintain, operate, and furnish rooms wherein their members may engage in drinking alcoholic beverages. The individual plaintiffs named own the lands upon which the clubs operate, and are also members and officers thereof. None of the plaintiffs is licensed under the Michigan liquor control act. Operations are conducted in the manner expressly forbidden by section 26c above quoted. The defendant Buder is the sheriff of Kalamazoo county and as such is charged with enforcing the valid provisions of the liquor control act. The defendant Commission is an agency of the State, invested, under the statute and the Constitution, (article 16, § 11, as amended at

the general November election in 1932), with "control of the alcoholic beverage traffic."

Claiming that their rights will be substantially infringed by the enforcement of the section of the statute in question, plaintiffs instituted suit in equity in the circuit court to restrain defendants from taking action against them, asserting as the basis for the suit the invalidity of said section. Defendants filed their respective answers to the bill of complaint, denying the various claims advanced by plaintiffs in support of their alleged right to relief, and the case was submitted to the trial court on an agreed statement of facts. The result was the entry of a decree denying the relief sought and dismissing the bill of complaint. Plaintiffs have appealed.

On behalf of appellants it is argued that the action of the Governor in returning to the House of Representatives, with veto message attached, the first draft of the enrolled act as submitted to him was final, and that the approval of the corrected enrolled act violated article 5, § 36, of the State Constitution. It is insisted, in effect, that the omission of the reference in the title to the added section was a mere clerical error. Attention is directed to decisions involving mistakes of such character, of which Board of Control of the Michigan State Prison v. Auditor General, 149 Mich. 386, is typical. There the mistake in the enrolled act, as signed by the speaker of the House, the president of the Senate, and the Governor, consisted in the omission of the word "thousand" from the body of the act, which was an appropriation measure. However, the provisions of the enrolled act as printed and signed were such as to leave no doubt as to the intention of the Legislature, nor was the validity of any provision affected. In commenting on the situation, it was said:

> "It is a clerical error which corrects itself and leaves nothing doubtful. Such clerical errors will not be permitted to defeat the plain intent of the legislature."

The situation in the case at bar is not analogous. The inclusion of the reference to the added section in the title of the measure here involved was essential to its validity.

Its omission in the original draft of the enrolled act was more than a mere clerical error. We think it may be assumed that the Legislature considered the section in question as a material part of the bill. As a result of the error in printing, the enrolled act submitted to the Governor differed materially *in substance* from the draft of the measure as passed by the Legislature. On discovering the mistake that had been made the clerk of the House of Representatives acted properly in causing to be printed and submitted a corrected enrolled act. In doing so he merely performed the duty resting on him by virtue of his official position. As a result the measure was submitted to the Governor in proper form, and was duly approved. The prior attempted submission was under the circumstances a mere nullity. The action of the Legislature may not be invalidated on the basis of an error that was subsequently, and properly, corrected.

Appellants further contend that section 26c violates certain provisions of the State and Federal Constitutions and should, in consequence, be decreed invalid. Reliance is placed on article 5, § 21, of the State Constitution, which contains the following provision:

> "No law shall embrace more than 1 object, which shall be expressed in its title."

The title of the Michigan liquor control act, above cited, is as follows:

> "An Act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and privileges thereto; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referen-

dum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances."

The act was adopted in accordance with the State Constitution, article 16, § 11, as amended at the general election in 1932, which reads as follows:

> "The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same."

The statute was obviously designed to put into practical effect the will of the people of the State as expressed in the amendment to the Constitution. The title is sufficiently broad to permit the accomplishment of that purpose. Whatever might have been incorporated into the original act under such title may be added thereto by way of amendment. Surtman v. Secretary of State, 309 Mich. 270. Appellants' argument rests on the theory that section 26c is prohibitory in character, that the title indicates that the object of the measure is to provide for the regulation and control of the liquor traffic, that prohibition is not included in the terms used, and that the inclusion of said section in the liquor control act is in effect an attempt to declare two objects to be attained thereby.

Attention is directed to People v. Gadway, 61 Mich. 285, which involved an attempt of the Legislature to amend an act providing in its title for the regulation of the sale of liquors by prohibiting such sales within a radius of two miles from the grounds of the Michigan Military Academy near Orchard Lake. Apparently by oversight, the premises of the academy were not included within the area affected. However, the prohibition was absolute as to the territory described. It was held that the purpose of such amend-

ment was not embraced within the title and that, in consequence, such amendment was void. Likewise, in In the Matter of Charles Hauck, 70 Mich. 396, it was held that provisions for the adoption of prohibition by counties were invalid under a title providing merely for the regulation of the manufacture and sale of liquors. People v. Gadway, supra, was cited in support of the proposition that regulation does not include prohibition.

The cases relied on by appellants are not controlling in the case at bar. We are not concerned with legislative action prohibiting the liquor traffic in any particular area of the State, or authorizing such action under local option. Section 26c was obviously not designed to establish prohibition in any part of the State. Its purpose was, as the language used clearly indicates, to regulate the use of intoxicating liquors. To that end the furnishing of premises not licensed under the act where liquor may be consumed and the sale of food and other articles to promote drinking thereon were forbidden. The inhibition was not directed in terms against the traffic in liquor or the use thereof, but rather against the owners and operators of unlicensed premises. The regulation imposed is analogous to other provisions of the liquor control act relating to the granting of licenses for locations within a certain distance from churches or school buildings, forbidding sales to minors, and imposing restraints on the furnishing of alcoholic liquor on Sundays and election days and on drinking on public highways and in certain other public places. The title of the statute provides for "the control of the alcoholic beverage traffic within the State." Such provision is sufficiently broad in scope to cover the enactment here in question. It is consistent with the broad language used in the amendment to the Constitution pursuant to which the control act was passed by the Legislature.

In People v. Japinga, 115 Mich. 222, the defendant was convicted of violating a statute forbidding a minor to remain in a place where intoxicating liquors were sold. The title of the act in which such provision was contained related to the taxation and regulation of the business of manufacturing and selling intoxicating liquors (PA 1887, No. 313). It was claimed that the section on which the

prosecution was based was prohibitory in character and not within the scope of the title. In rejecting such contention, it was said:

> "It might be said with equal force that any regulation of the traffic involves, of necessity, a prohibition of conducting the business in defiance of the regulations."

In People v. Wheeler, 185 Mich. 164, the title of the act referred to the regulation of the liquor traffic and also to prohibition thereof in certain cases. It was claimed that the act, as indicated by the title, embraced more than one object, and reliance was placed on People v. Gadway, supra, in support of the claim that regulation and prohibition are not synonymous terms. In discussing the matter, it was said:

> "But in our opinion the title of the act in question shows that the act is aimed at but one subject, viz., intoxicating liquor, and provides for the regulation of the sale thereof and the prohibition of the sale under certain conditions. All of which is clearly expressed in the title. Justice Cooley, in *People* v. *Mahaney*, 13 Mich. 481, 495, in speaking of the constitutional provision which declares that 'no law shall embrace more than one object, which shall be expressed in its title' (section 20, art. 4, Constitution of 1850, and section 21, art. 5, Constitution of 1909), said:
>
> " 'But this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title. To require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless, but would actually render legislation impossible.' "

The Court also quoted with approval from Flower v. Witkovsky, 69 Mich. 371, where it was said:

> "The main purpose of the act is to regulate and prohibit the sale of liquors, to provide when it shall be lawful and when it shall be unlawful, and what

remedies may be resorted to in cases of unlawful selling and injuries resulting from such unlawful sales.

"These things all belong to one primary object, which is the distinguishing of lawful from unlawful sales under the law, and providing penalties and remedies against unlawful sales, and the natural consequences resulting therefrom."

The meaning and scope of article 5, § 21, of the Constitution were considered in *Loomis* v. *Rogers*, 197 Mich. 265, where the conclusion reached was indicated in the following language:

"The claim of defective title is based on the familiar provision in section 21, art. 5, of our Constitution that no law shall embrace more than one object, which shall be expressed in its title. This provision has proved a tempting source of attack on the validity of statutes with which parties are dissatisfied, for few laws of any length are enacted where the objection cannot be plausibly urged as to details and auxiliary provisions incidental to the main purpose of the legislation appearing in the body of the act and not itemized in the title. The Covert act embraces 75 sections, authorizing, outlining, and providing the means and legal machinery for an intended additional method of constructing and improving highways. An abridgment of all those sections is not essential to a sufficient title. While it contains various related provisions not directly indicated or enumerated in the title, under the construction of this constitutional requirement, as many times reviewed by this court, if the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose, the constitutional requirement is met."

In *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, the body of the act contained a provision forbidding certain forms of

advertising. The title indicated the general purpose to provide for the "examination, regulation, licensing and registration of optometrists." In holding that such title was sufficient, it was said:

> "It is claimed that this title does not give notice of a prohibition against certain types of advertising by a corporation engaged in optometrical work. While the title may be somewhat inartistically drawn, it is not inarticulate. It does call attention to the regulation of the practice of optometry and for the punishment of offenders against the act. We believe it stands the tests set forth in previous cases. *Pratt Food Co.* v. *Bird*, 148 Mich. 631 (118 Am. St. Rep. 601); *People* v. *Wohlford*, 226 Mich. 166; *People* v. *Carroll*, 274 Mich. 451."

See, also, *People* v. *Brooks*, 101 Mich. 98; *Osborn* v. *Charlevoix Circuit Judge*, 114 Mich. 655; *People* v. *Dornbos*, 127 Mich. 136; *Sisson* v. *Lampert*, 159 Mich. 509; *Kull* v. *Michigan State Apple Commission*, 296 Mich. 262. It is our conclusion that section 26c of the liquor control act is within the scope of the title, and that such act does not have more than one object, which is, as clearly indicated, the regulation and control of the liquor traffic.

It will be noted that the section in question, above set forth, expressly excludes hotels from its operation. Appellants claim that such exclusion renders the statute discriminatory and amounts to a denial of the equal protection of the laws, in violation of article 2, § 1, of the State Constitution, and of the 14th amendment to the Federal Constitution. An analogous question was raised in *People* v. *Japinga*, *supra*, and determined adversely to the contention. Every reasonable intendment must be resolved in favor of the validity of the action of the Legislature. It must be assumed that as a result of its consideration of the subject matter that body reached the conclusion that the restrictive provisions of section 26c were not necessary or practicable insofar as hotels were concerned.

The burden of proof is on the appellants to establish their claim of invalidity. As held in *Naudzius* v. *Lahr*, 253 Mich. 216:

> "Classification need not be made to operate with mathematical nicety, and is not invalid because in practice it results in some inequality." (Syllabus 10.)

Appellants direct attention to *Cook Coffee Co.* v. *Village of Flushing*, 267 Mich. 131, and *Colonial Baking Co.* v. *City of Fremont*, 296 Mich. 185, in which discriminations based on residence were held invalid. We do not think that such decisions are in point in the instant controversy. Under the broad powers of the Legislature with reference to the subject matter, it cannot be said that the section of the statute here involved operates to deprive the appellants of their property rights, or denies to them the equal protection of the laws, in violation of the constitutional provisions invoked. *Fitzpatrick* v. *Liquor Control Commission*, 316 Mich. 83.

Appellants' claim that the restrictions on their operation are unreasonable and hence not a proper exercise of police power has been sufficiently covered in the foregoing discussion. See, also, *C. F. Smith Co.* v. *Fitzgerald*, 270 Mich. 659; *Case* v. *Liquor Control Commission*, 314 Mich. 632. The further contention that the addition of the proposed new section to House Bill 405 resulted in changing the original purpose of the measure, in violation of article 5, § 22, of the State Constitution, is without merit. The purpose of the amendatory act, as well as of the statute amended, was the proper control of the liquor traffic in the manner authorized and contemplated by the Constitution of the State. Incidental questions suggested do not require discussion.

The decree of the trial court is affirmed. The validity of a legislative enactment of the State being involved, no costs are allowed.

(1938)

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CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 788

THE EIGHT O'CLOCK CLUB, A CORPORATION, AND ROY WOOD,

Appellants,

vs.

OTTO K. BUDER AND MICHIGAN LIQUOR CONTROL COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

Page

Statement opposing jurisdiction and motion to dismiss or affirm 1

Table of Cases Cited

Beacon Club v. *Kalamazoo Sheriff*, 332 Mich. 412, 52 N.W. (2d) 165 2

Cronin v. *City of Denver*, 192 U.S. 109 3

Crowley v. *Christensen*, 137 U.S. 86 3

Eberle v. *Michigan*, 232 U.S. 700 3

Eight O'Clock Club v. *Buder*, 332 Mich. 421 4

Fitzpatrick v. *Liquor Control Commission*, 316 Mich. 83 3

Goesaert v. *Cleary, et al.*, 235 U.S. 464 5

Indianapolis Brewing Co. v. *Liquor Control Commission*, 305 U.S. 391 3

Mugler v. *Kansas*, 123 U.S. 623 3

Naudzius v. *Lahr*, 253 Mich. 216 5

Roschen v. *Ward*, 279 U.S. 337 5

Ziffu v. *Reeves*, 308 U.S. 132 3

Zucht v. *King*, 260 U.S. 174 5

Statutes Cited

Constitution of Michigan, Article 16, Section 11 4

Constitution of the United States, 14th Amendment 6

Michigan Liquor Act, Section 26b and 26c (added by Mich. Pub. Acts 1949, No. 295, Mich. Stat. Ann. 1951, Cum. Supp. Sec. 18.997(3)) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 788

THE EIGHT O'CLOCK CLUB, A CORPORATION, AND ROY WOOD,

Appellants,

vs.

OTTO K. BUDER AND MICHIGAN LIQUOR CONTROL COMMISSION

Appellees

STATEMENT OF OTTO K. BUDER AND MICHIGAN LIQUOR CONTROL COMMISSION, APPELLEES, DISCLOSING MATTERS AND GROUNDS MAKING AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Otto K. Buder and Michigan Liquor Control Commission, the appellees, believing that the matters set forth below will demonstrate the lack of substance in the Federal questions raised by this appeal, file this, their statement, disclosing matters and grounds making against jurisdiction and pursuant to Supreme Court Rule 12, §3, they respectfully move the Court to dismiss the appeal or affirm the judgment of the court below, on the following grounds:

First: Appellants brought action in the circuit court for the county of Kalamazoo (Michigan) in chancery, contest-

ing, on several grounds, the validity of § 26c of the Michigan Liquor Control Act, eliminating so-called "bottle clubs," except as to hotels.[1] The trial court held the section of the statute constitutional, entered judgment for defendants, and plaintiffs appealed. The Michigan Supreme Court held,[2] inter alia, that under the broad powers of the legislature with reference to control of intoxicating liquors, the operation of "bottle clubs," except as to hotels, did not deprive the operators of such clubs or the owners of premises on which clubs were operated, of their property rights or deny them equal protection of the laws. The section of the law in question reads:

> "Sec. 26c. No person shall maintain, operate, lease or otherwise furnish to other persons any premises or place which is not licensed under this act, wherein such other persons may engage in the drinking of alcoholic beverages, for a fee or for any consideration, including the sale of food, mixers, ice or other fluids used with alcoholic drinks or the storage of alcoholic liquors: Provided, That the provisions of this section shall not apply to any hotel nor to any licensee under the provisions of this act: Provided further, That the provisions of this section shall not be construed to repeal or amend the provisions of section 26b of this act."[3]

Second: At the November election in 1932 the people of the State of Michigan ratified a proposed amendment to Article 16, § 11, of the State Constitution, thereby repealing the liquor prohibition amendment of 1916 and providing in

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[1] Michigan Liquor Act, § 26c, added by Mich. Pub. Acts 1949, No. 295, Mich. Stat. Ann. 1951 Cum. Supp. § 18.997(3).

[2] *Beacon Club* v. *Kalamazoo Sheriff*, 332 Mich. 412; 52 N. W. 2d 165.

[3] Sec. 26b of the act provides: "That alcoholic liquor may be served by any hotel licensed individually under the provisions of this act in the room of a bona fide guest thereof. No spirits shall be consumed in any place licensed under this act to sell beer and/or wine and not licensed to sell spirits."

substance that the legislature might by law create a liquor control commission who, subject to statutory limitations, should exercise complete control of the alcoholic beverage traffic within the state, including the retail sales thereof.

The Michigan liquor control act of 1933 created such a commission, who, under an unbroken line of decisions of the State Supreme Court, construing both the constitutional amendment and the statute itself,[4] became vested by the Constitution of the State with plenary power to control the alcoholic beverage traffic, subject only to express statutory provisions limiting its exertion.

Since *Mugler* v. *Kansas*, 123 U. S. 623, the substantive power of a State to prevent the sale of intoxicating liquor has been undoubted,

Indianapolis Brewing Co. v. *Liquor Control Commission*, 305 U. S. 391, 394,

and this Court recognizes that control of the liquor traffic is so peculiarly within the province of legislative power that the regulation, or even prohibition thereof, in many instances, does not deprive an individual of property without due process of law, or deny him equal protection of the laws,

Eberle v. *Michigan*, 232 U. S. 700.

No individual has a constitutional right to engage in the liquor business.[5]

The Michigan "bottle clubs" (seeking leave to appeal to this Court) cut their argument rather fine in urging that since their operations do not involve the *sale* of intoxicating beverages, they are not subject to the act. The statute in question, however, by its title was designed to provide

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[4] *Fitzpatrick* v. *Liquor Control Commission*, 316 Mich. 83, and cases cited, p. 90.

[5] *Crowley* v. *Christensen*, 137 U. S. 86, cf. *Cronin* v. *City of Denver*, 192 U. S. 109, 114. Please see also, *Ziffin* v. *Reeves*, 308 U. S. 132.

for the control of alcoholic liquor traffic within the state of Michigan, and, according to the decision of the highest court of the state in the present cause, § 26c comes within the ambit of such a title. Construing its provisions, the Court said, 332 Mich. at p. 421:

> "Its purpose was, as the language used clearly indicates, to regulate the use of intoxicating liquors. To that end the furnishing of premises not licensed under the act where liquor may be consumed and the sale of food and other articles to promote drinking thereon were forbidden. The inhibition was not directed in terms against the traffic in liquor or the use thereof, but rather against the owners and operators of unlicensed premises. The regulation imposed is analogous to other provisions of the liquor control act relating to the granting of licenses for locations within a certain distance from churches or school buildings, forbidding sales to minors, and imposing restraints on the furnishing of alcoholic liquor on Sundays and election days and on drinking on public highways and in certain other public places. The title of the statute provides for 'the control of the alcoholic beverage traffic within the state.' Such provision is sufficiently broad in scope to cover the enactment here in question. It is consistent with the broad language used in the amendment to the Constitution pursuant to which the control act was passed by the legislature."[6]

It is therefore obvious that the Michigan liquor control act goes far beyond the regulation of "sales" of intoxicating liquors.

Third: As noted by the Michigan Supreme Court, 332 Mich. p. 425, the section in question expressly excludes hotels from its operation. The appellants claimed and now

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[6] Article 16, § 11 of the Michigan State Constitution provides: "The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within the state, including the retail sales thereof . . ."

urge that such exclusion renders the statute discriminatory and amounts to a denial of the equal protection of the laws in violation of the Fourteenth Amendment. The Michigan court held against this contention, and we respectfully submit their decision is founded on sound principles applied many times by this Court.

The Michigan court, id., p. 425, expressed the opinion that every reasonable intendment must be resolved in favor of the validity of the action of the legislature:

> "It must be assumed that as a result of its consideration of the subject matter that body reached the conclusion that the restrictive provisions of section 26c were not necessary or practicable, insofar as hotels were concerned."

Classification need not be made to operate with mathematical nicety, and is not invalid because in practice it results in some inequality.[1]

Such views, we respectfully submit, are in accord with those frequently expressed by this Court,

Zucht v. *King*, 260 U. S. 174, 176-177, and cases cited.

And such principles have recently been applied by the Court to another classification set up in the Michigan liquor control act, in an opinion which we respectfully submit is decisive here, *Goesaert* v. *Cleary et al.*, 235 U. S. 464. It there sufficed to say, as we do here, that the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same," *Tigner* v. *State of Texas*, 310 U. S. 141, 147. And that "A statute is not invalid because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce," *Roschen* v. *Ward*, 279 U. S. 337, 339.

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[1] Citing *Naudzius* v. *Lahr*, 253 Mich. 216.

We respectfully submit there is no substance whatsoever to appellants' claim that § 26c of the Michigan liquor control act violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, Otto K. Buder and the Michigan Liquor Control Commission, appellees, respectfully submit this statement disclosing the foregoing matters and grounds making against the jurisdiction of this Court, and in that connection, their motion to dismiss or affirm.

Respectfully submitted,

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(1937)

INDEX TO CASES AND AUTHORITIES CITED

	Page
Bailey vs. People, 190 Ill. 28; 60 N. E. 98	5
Eberle vs. Michigan, 232 U. S. 700, 34 S. Ct. 464	3
Frost vs. Corporation Commission, 278 U. S. 515; 49 S. Ct. 235; 73 L. Ed. 483	5
Goesaert vs. Cleary, et al., 335 U. S. 464	3
Indianapolis Brewing Co. vs. Liquor Control Commission, 305 U. S. 391, 394, 59 S. Ct. 254	2
People vs. Schwenk, 257 Ill. 384; 100 N. E. 994	5
Quaker City Cab vs. Penn, 277 U. S. 389; 48 S. Ct. 553; 72 L. Ed. 927	5
Tigner vs. State of Texas, 310 U. S. 141, 60 S. Ct. 879	3
Yick Wo vs. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed.	4
Zucht vs. King, 260 U. S. 174, 43 S. Ct. 24	3